STATE OF MICHIGAN

COURT OF APPEALS

NADA MOHAMED JELATI,

Plaintiff-Appellant,

v

KAMAL FAUZI,

Defendant-Appellee.

UNPUBLISHED
April 23, 1999

No. 202678
Wayne Circuit Court
LC No. 96-630795 NO

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this negligence action. We affirm.

Plaintiff and defendant are siblings who at the time of plaintiff's trip and fall lived next door to each other. Plaintiff was injured when she fell while walking down her brother's driveway. Plaintiff alleged that her injuries were caused by an uneven lay of land that existed between the driveway and the adjoining lawn.

On appeal, plaintiff contends that the trial court erred when it granted summary disposition. We disagree. We review motions for summary disposition de novo in order to determine "whether the moving party was entitled to judgment as a matter of law." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

To establish a prima facie case of negligence, a plaintiff must prove (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). "[Q]uestions regarding duty are for the court to decide as a matter of law." *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). "[T]he duty owed by the landowner depends upon the status of the injured party at the time of the injury. . . ." *Leep v McComber*, 118 Mich App 653, 657; 325 NW2d 531 (1982). Both parties agree that at the time of her accident, plaintiff's status was that of a licensee[1]. In *Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759 (1970), the Supreme Court set forth the duty owed to a licensee:

> "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> "(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> "(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> "(c) the licensees do not know or have reason to know of the condition and the risk involved." [*Id.* at 453, quoting 2 Restatement Torts, 2d, § 342, p 210.]

"However, a possessor of land owes no duty [to an adult licensee] regarding open and obvious dangers." *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993). Accord *Millikin v Walton Manor Mobile Home Park, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 207051, issued March 19, 1999), slip op, p 4. A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp*, (*On Rem*), 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiff argues that the trial court erred when it concluded that the danger presented by the abutment of the two surfaces was capable of being discovered by an ordinary person. We disagree. We believe that the danger presented by the condition would be apparent upon "casual inspection" by "an average user with ordinary intelligence." *Id*. Indeed, the existence of any possible unevenness between a paved driveway and an abutting lawn is "the type of everyday occurrence" that a reasonably prudent person should watch out for when traversing such a surface. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616; 537 NW2d 185 (1995). Further, the fact that the driveway was not directly illuminated and partially obstructed by defendant's truck should have alerted plaintiff that she might have to be even more alert when walking down the driveway. See 2 Restatement Torts, 2d, § 342, cm b, p 210 ("If the licensees are adults, the fact that the condition is obvious is usually sufficient to apprise them, as fully as the possessor, of the full extent of the risk involved in it.").

Plaintiff also argues that the trial court erred when it found that the risk of harm was not unreasonable. Again, we disagree. Based on the record before us, and even when viewed in a light most favorable to plaintiff, we conclude that there was nothing about the "'character, location, or surrounding conditions,'" that made the risk of harm presented by the uneven surface unreasonable. *Bertrand*, *supra* at 617, quoting *Garrett v W. S. Butterfield Theatres*, 261 Mich 262, 264; 246 NW 57 (1933).

Finally, plaintiff argues that the trial court erred in denying plaintiff's request to amend her complaint to allege "certain provisions potentially under the Dearborn ordinance." We disagree. MCR 2.116(I)(5) states that a court faced with a summary judgment motion brought under subrule (C)(10) must give a plaintiff an opportunity to amend his or her complaint "as provided by MCR 2.118,[2] unless the evidence then before the court shows that amendment would not be justified." One circumstance in which the granting of leave to amend would not be justified is where an amendment would be futile. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998). We conclude that given the lay of the land was open and obvious, plaintiff's proposed amendment was futile.[3] Accordingly, we see no abuse of discretion on the part of the trial court.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] "A 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent . . . ." *Wymer v Holmes*, 429 Mich 66, 71, n 1; 412 NW2d 213 (1987). A social guest is a licensee. *Id.*

[2] MCR 2.118(A)(1) states that "[a] party may amend a pleading once as a matter of course . . . within 14 days after serving the pleading if it does not require a responsive pleading." Thereafter, "[a] party may amend a pleading only by leave of the court or by written consent of the adverse party." *Id.* at (A)(2). Leave to amend a pleading should "be freely given when justice so requires." *Id.*

[3] Further, we note that during the hearing on plaintiff's motion, defendant informed the trial court that an inspector for the city of Dearborn had examined the driveway and determined that the grade abutting the edge of the driveway was up to code. This assertion was neither challenged below nor on appeal.